



Comptroller General
of the United States
Washington, D.C. 20548

154192

Decision

Matter of: Robert P. Morris

File: B-258937

Date: April 28, 1995

DIGEST

1. Although an erroneous payment was made in 1987, the Internal Revenue Service first definitely determined that an erroneous payment had been made on June 30, 1993, when a notice of indebtedness was sent to the claimant. Thus, claimant's request for waiver, dated July 12, 1993, was timely filed within the statutory 3-year limitation period of 5 U.S.C. § 5584 for waiver applications. See 54 Comp. Gen. 133, 136 (1974).
2. Waiver is generally precluded when, as here, an employee receives a significant unexplained increase in compensation and knows or reasonably should know that an erroneous payment has occurred and fails to make inquiries or bring the matter to the attention of the appropriate officials. See 4 C.F.R. § 91.5(b) (1995).

DECISION

This is in response to the appeal of Mr. Robert P. Morris from our Claims Group's settlement action, Z-2926726, Aug. 9, 1994, denying his request for waiver of erroneous payments on the ground that it was untimely filed. For the following reasons, we find that his appeal was timely filed, but we deny Mr. Morris's request for waiver on the merits.

In March 1987, the Internal Revenue Service (IRS) erroneously granted Mr. Morris a within-grade increase to GS-13, step 8, retroactive to January 19, 1986. Since Mr. Morris's prior position until July 1986 (Program Analyst, GM-13) was covered by the Performance Management and Recognition System (PMRS) or "merit pay system," he was not entitled to receive a within-grade increase. Shortly thereafter, the IRS discovered the error and immediately notified Mr. Morris verbally that a mistake had been made, that he was not entitled to the within-grade increase, and that an adjustment would be made to correct the action. Mr. Morris admits receiving such notification in late March 1987. Subsequently, a retroactive payment in the gross amount of \$1,989.60 (net \$1,254.01) reflecting the erroneous within-grade increase for the period from January 19, 1986, through March 28, 1987, was received by Mr. Morris in his paycheck on July 27, 1987.

There is no evidence that Mr. Morris notified the IRS or made any inquiry about this payment.

In addition to the above erroneous retroactive payment of July 27, 1987, Mr. Morris continued to receive erroneous biweekly payments reflecting the within-grade increase for the period of March 29 through September 12, 1987. The total gross amount of these erroneous payments was \$595.20 (net \$254.16). In late 1987, an account receivable was established for those payments and was collected from Mr. Morris's terminal annual leave account in January 1988, when he retired from the IRS. Mr. Morris states that he understood that no further adjustment would be made and that the matter was closed.

Eventually, on August 24, 1988, some 8 months after Mr. Morris had retired, the IRS established an account receivable for the erroneous retroactive payment of July 27, 1987. This account receivable was established for a gross amount of \$1,360 (net \$1,252.86). The IRS report notes that the amount of this account receivable differs from the actual erroneous payment because it was paid in a prior year.

It was not until 5 years later, however, by letter, dated June 30, 1993, that the IRS informed Mr. Morris that he was indebted to the government for \$1,252.86, and that he could apply for a waiver.¹ This was the first time which the IRS had communicated with Mr. Morris on this matter since January 1988. Mr. Morris requested waiver of the debt by letter to the IRS, dated July 12, 1993.

Since Mr. Morris's indebtedness for erroneous payments made during the period of March 29 through September 12, 1987, has been satisfied, we need only consider his request for waiver of the remaining \$1,360 erroneous payment. The threshold issue is whether the waiver request has been timely filed. The statute provides that waiver authority may not be exercised if application for waiver is received "after expiration of three years immediately following the date on which the erroneous payment of pay was discovered" 5 U.S.C. § 5584(b)(2) (1988). Under the implementing regulations:

"The employee, member, or other person from whom collection is sought shall be promptly notified of the discovery of an erroneous payment. In determining the date of discovery of an erroneous payment, all doubts are to be resolved in favor of the applicant." 4 C.F.R. § 91.5(a)(2) (1995).

In construing the statute, we have held that the 3-year period runs "from the date it is first definitely determined by an appropriate official that an erroneous payment had been made." 54 Comp. Gen. 133, 136 (1974).

¹The IRS letter used the net amount. The correct corresponding gross amount is \$1,360. Requests for waiver of erroneous payments must be based on the gross amount. See 4 C.F.R. §§ 91.2(j) and 92.2(c) (1995).

In the present case, although Mr. Morris was verbally notified of an error in March 1987 and an account receivable was established in August 1986, we do not regard an appropriate IRS official as first definitely determining that an erroneous payment in the gross amount of \$1,360 had been made until IRS sent the debt letter, dated June 30, 1993, to Mr. Morris. Thus, we regard Mr. Morris's request for waiver, dated July 12, 1993, as filed within the statutory 3-year limitation period. Compare Major Robert D. Gentile, USA, B-244217, Dec. 19, 1991. Thus, Mr. Morris's request may be considered for waiver.

On the merits, our Office has consistently held that when an employee knows or reasonably could be expected to know that he is receiving compensation to which he is not entitled, he has a duty to retain such amounts for subsequent refund to the government, and to make prompt inquiry concerning his compensation. Hawley E. Thomas, B-227322, Sept. 19, 1988. In the instant case, Mr. Morris had actual notice in late March 1987 that any payment on the basis of his erroneous within-grade increase would be incorrect. Moreover, the \$254.16 net adjustment in January 1988, which he understood to have resolved the matter, was considerably less than the erroneous retroactive payment which he received on July 27, 1987. In this regard, waiver is generally precluded when an employee receives a significant unexplained increase in pay and fails to make inquiries or bring the matter to the attention of the appropriate officials. See 4 C.F.R. § 91.5(b) (1995). Thus, we deny waiver of the \$1,360 erroneous payment since Mr. Morris cannot be said to be "without fault" in this matter.

In this regard, however, because of the lengthy delay in asserting the claim, the cost of collection, the age of the claim, and Mr. Morris's claim of hardship, the IRS may consider compromise of this claim under 4 C.F.R. § 103.1 et. seq. (1995) or termination of this claim under 4 C.F.R. § 104.3 (1995).

/s/ Seymour Efros

for Robert P. Murphy
General Counsel